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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 535

TRANSIT COMMISSION AND STATE OF NEW YORK, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, THE LONG ISLAND RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, AND INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT AS TO JURISDICTION ON APPEAL.

The appellants, in support of the jurisdiction of the Supreme Court to review the above entitled cause on appeal, respectfully represent:

A.

Statutory Provisions Sustaining Jurisdiction.

Sections 41, 41-(27), 41-(28), 44, 47 and 47*a*, Title 28 of the United States Code, being the Act of Congress approved June 30, 1926, provide as follows:

> "SEC. 41. *Original Jurisdiction.*—The district courts shall have original jurisdiction as follows:
>
> "SEC. 41, Subd. (27). *Enforcement of Orders of Interstate Commerce Commission.*—Twenty-seventh. Of all cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money. (June 18, 1910, c. 309, Sec. 1, 36 Stat. 539; Mar. 3, 1911, ch. 231, Sec. 207, 36 Stat. 1148; Oct. 22, 1913, c. 32, 38 Stat. 219.)
>
> "SEC. 41, Subd. (28). *Setting Aside Order of Interstate Commerce Commission.*—Twenty-eighth. Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission. (June 18, 1910, c. 309, Sec. 1, 36 Stat. 539; Mar. 3, 1911, c. 231, Sec. 207, 36 Stat. 1148; Oct. 22, 1913, c. 32, 38 Stat. 219.)"
>
> "SEC. 44. *Procedure in Certain Cases.*—The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by subdivisions 27 and 28 of section 41 of this title, and sections 20 and 43 of Title 49, shall be as provided in section 45 of this title.

The orders, writs, and processes of the district courts may in these cases run, be served, and be returnable anywhere in the United States. (Oct. 22, 1913, c. 32, 38 Stat. 220; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938.)"

"SEC. 47. *Interlocutory Injunctions as to Orders of Interstate Commerce Commission; Appeal to Supreme Court.*—No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit. In cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part,

of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. (Oct. 22, 1913, c. 32, 38 Stat. 220.)"

"SEC. 47*a*. (*Judicial Code, Section* 210.) *Appeal to Supreme Court from Final Decree; Time for Taking; Priority.*—A final judgment or decree of the district court in the cases specified in section 44 of this title may be re-

viewed by the Supreme Court of the United States if appeal to the Supreme Court taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such cases the notice required shall be served upon the defendants in the case and upon the attorney general of the State. The district court may direct the original record instead of a transcript thereof to be transmitted on appeal. The Supreme Court may affirm, reverse, or modify as the case may require the final judgment or decree of the district court in the cases specified in section 44 of this title. Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the district court appealed from, unless the Supreme Court or a justice thereof shall so direct, and appellant shall give bond in such form and of such amount as the Supreme Court, or the justice of that court allowing the stay, may require. Appeals to the Supreme Court under this section and section 47 of this title shall have priority in hearing and determination over all other causes except criminal causes in that court. (Mar. 3, 1911, c. 231, Sec. 210, 36 Stat. 1150; Oct. 22, 1913, c. 32, 38 Stat. 220.)"

B.

The Statute Involved is Section 1, Paragraph 18, of the Interstate Commerce Act (U. S. C. A. 49, page 121).

"SEC. 1, *Par.* (18). *Extensions or Abandonment of Lines; Certificate Required.*—No carrier by railroad subject to this chapter shall

undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment."

C.

Date of Decree and Date Upon Which Application for Appeal Was Presented.

The decree sought to be reviewed was entered on the 20th day of October, 1932, and the application for the appeal was submitted on the 7th day of November, 1932.

D.

Nature of Case and Rulings Below; This is a Consolidated Case.

On March 21, 1932, the Transit Commission instituted a suit against the United States of America,

The Long Island Railroad Company and The Pennsylvania Railroad Company by filing a petition in the United States District Court for the Southern District of New York, pursuant to Sections 41-(27), 41-(28) and 44 of Title 28 of the United States Code.

The petition prayed that the District Court enjoin, set aside and annul an order of the Interstate Commerce Commission issued February 8, 1932, which certified that the present and future public convenience and necessity require the continued operation by The Long Island Railroad Company under trackage rights over the railroad of the Pennsylvania Tunnel and Terminal Railroad Company between Harold Avenue and Sunnyside Yard and the Pennsylvania Station, New York, New York, upon the express condition that the terms and conditions be modified in the respects and to the extent indicated in said certificate.

On April 15, 1932, the State of New York filed an identical petition against the same parties seeking the same relief.

Respondents in both suits filed answers.

The Interstate Commerce Commission was permitted to intervene in both suits and filed answers thereto.

On June 8, 1932, upon the application of the Transit Commission and the State of New York an order to show cause was made pursuant to Section 47 of Title 28 of the United States Code, convening a special court of three judges of whom one was a circuit court judge, returnable June 28, 1932, requiring the respondents to show cause before that court so constituted and convened why the order of the Interstate Commerce Commission should not be temporarily enjoined.

At the request of the court and consent of the parties, the hearing set down for June 28, 1932, was adjourned to June 29, 1932.

At the hearing held on June 29, 1932, the two suits were consolidated and all parties consented to the hearing being considered as and for a final hearing and rested on the record before the Interstate Commerce Commission. On October 3, 1932, the court handed down an opinion holding that the application for the interlocutory and final injunctions should be denied and the petitions dismissed.

On the 20th day of October, 1932, a decree was made and entered denying the applications for interlocutory injunctions and finally dismissing petitions. An appeal from said decree was applied for on the 7th day of November, 1932.

E.

Cases Believed to Sustain Jurisdiction.

The following decisions of this Court are believed to sustain jurisdiction of this appeal.

Louisville & Nashville R. R. Co. v. *United States*, 238 U. S. 1.

New England Divisions Case, 261 U. S. 184.

Manufacturers H. & R. Co. v. *United States*, 246 U. S. 257.

Texas v. *Eastern Texas R. R. Co.*, 258 U. S. 204.

Colorado v. *United States*, 271 U. S. 153.

Transit Commission v. *United States*, 284 U. S. 360.

We respectfully submit that the Supreme Court has jurisdiction of this appeal by virtue of Sections 41, 41-(27), 41-(28), 44, 47 and 47(*a*), Title 28 of the United States Code.

GEORGE H. STOVER,
Solicitor for Appellant Transit Commission.
JOHN J. BENNETT, JR.,
Solicitor for Appellant State of New York.

Filed November 9, 1932.